To Be Argued By:
Elizabeth Clifford

Time Requested: 10 Minutes

STATE OF NEW YORK
COUNTY COURT COUNTY OF MONROE

THE PEOPLE OF THE STATE OF NEW YORK,

Appellant,

-vs-

RAMONA SANTORELLI, MARY LOU SCHLOSS,
KATHLEEN REILLY, and ELISE JO TOOLEY,

Respondent.

BRIEF FOR APPELLANT

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PRELIMINARY STATEMENT

This is an appeal from an Order of the Rochester City Court (Walz, J.), entered March 12, 1987, dismissing the charge of Exposure of a Person against the above-named defendant and sentencing them to

STATEMENT OF FACTS

On June 21, 1986 in Cobbs Hill Park in the City of Rochester several people took part in a protest against Penal Law Section 245.01, Exposure of A Person. (Record on Appeal hereinafter referred to as R. 21-27). This protest included chants, signs, a public gathering, and most importantly for this appeal, several woman bared their torsos. When ordered by the police to put their tops back on the seven women who refused were arrested (R-195) and charged with violating Section 245.01 of the Penal Law.

The defendants were arraigned in Rochester City Court and entered pleas of Not Guilty (R. 28-32). Voluminous motions were filed and answered in which the main focus was the defendant's request that the informations be dismissed on several grounds i.e. P.L. Section 245.01 violated the equal protection clause, the statute was unconstitutionally vague, and the enforcement of the statute violated the defendants' First, Ninth and Fourteenth Amendment Rights. (R. 63-67).

The People opposed these motions and specifically requested the court to rule on this motion before trial (R. 82-101, 166-167) but a lengthy trial was held (September 16-18, 1986) and the lower court then reserved decision. The lower court rendered a written decision in which he found the statute itself constitutional (R. 3-16) but "unconstitutional as applied to the defendants' conduct and that the charges against them should be dismissed" (R. 20). On March 12, 1987, the lower court signed an Order to this effect (R. 2) and the People appeal from this Order.

ARGUMENT

The lower court erred in its determination that the statute in question was unconstitutional as applied to the conduct of these defendants.

On June 21, 1986 the defendants in the case at bar took part in an act of civil disobedience . They intentionally bared their torsos, and, by so doing, they violated Penal Law Section 245.01, Exposure of a Person. The lower court determined that, because this violation of the law occurred as an act of protest to the law, the behavior was constitutionally protected by the First Amendment. The People contend that this decision creates an unworkable, impracticable standard for police and

prosecutors to apply and makes enforcement of the laws of New York State more difficult.

The District Attorney does not question the sincerity of the defendants' protest nor their deeply held belief that the statute in question works an injustice not only on women but upon our society as a whole. This issue which they so desperately want publicized is not the issue before this court nor was it the issue before the lower court. Even assuming that the defendants had the best of motives, does the First Amendment allow them to break the Penal Law to publicize their disapproval of the law? The People contend it does not.

It has long been held that the protective rights of the First and Fourteenth Amendments, when outside the scope of actual written or spoken words, are more amenable to state regulatory powers. People v. Karns, supra at 192. In California v. LaRue, 409 U.S. 109, the Court (at 117) stated:

> But as the mode of expression moves from the printed page to the commission of public acts that may themselves violate valid penal statutes, the scope of permissible state regulations significantly increases. States may sometimes proscribe expression that is directed to the accomplishment of an end that the State has declared to be illegal when such expression consists, in part, of "conduct" or "action". Hughes v. Superior Court, 339 U.S. 460 (1950); Giboney v. Empire Storage Co., 336 U.S. 490 (1949). In O'Brien, supra, the Court suggested

that the extent to which "conduct" was protected by the First Amendment depended on the presence of a "communicative element", and stated: "We cannot accept the view that an apparently limitless variety of conduct can be labeled "speech" whenever the person engaging in the conduct intends thereby to express an idea." 391 U.S. at 376.

In the present case, the defendants contend that by baring their breasts in a public place, and violating the statute, they are engaging in protected "speech". However, they fail to allege in what manner their arrest restrained the free dissemination of information, communication, or ideas. In fact, the defendants were never restrained from expressing their opinion or ideas in the spoken or written form, which remain the most protected forms of speech.

"action" can be an extension of speech - dramatizing of the point(s) of speech -

a "last resort" where speech fails to communicate freely (or hearers of speech fail to listen)

Although public streets, sidewalks and parks "have immemorially been held in trust for the use of the public and, time out of mind, must have been used for purposes of assembly, communicating thoughts between citizens and public questions" (Hague v. CIO, 307 U.S. 496, 575), nevertheless, where there is a significant governmental interest, the use of public streets and sidewalks is subject to reasonable and narrowly drawn content, neutral regulations as to time, manner and place (see Frisby v. Schultz, supra; Perry Education Association v. Perry Local Educators Association, 460 U.S. 37, 45 (1983); Grayned v. City of

parks (and beaches) are not streets and sidewalks

this argument appears to give "govt" free rein to squelch any protest in those places "held in trust for use of public" only by saying its in "govt's interest" to do so! Wow!!

Rockford, 408 U.S. 104 (1972), Blue Bird Coach Lines v. City of Niagara Falls, 53 NY2d 731 (1981), affng 75 AD2d 10003; Parkmed Company v. Pro-Life Counseling, Inc., 91 AD2d 551 [1st Dept. 1982]; People v. Maher, 137 Misc2d 162, 170 [Crim. Ct. City of New York, N.Y.Co. 1987]). Clearly any restriction must be circumscribed and limited to that necessary to serve a compelling State interest.

In the case at bar, the lower court properly found that "prohibiting public nudity is plainly within the State's police powers ... therefore, the government's underying objective asserted here is a legitimate one, and an important one." (R. 7.) The protestors, on the other hand, have "no fundamental right to appear nude or top-free in public." (R. 8).

In People v. Hollman, 68 N.Y. 2d 202 (1986), a male defendant claimed a freedom of expression violation. That defendant a nude sunbather in Riis Park, asserted that his nudity expressed his naturist philosophy that,

> Social nudity promotes health, that it permits heightened awareness of human similarity and vulnerability and that it presents an alternative to the repression of puritanism and the degradation of pornography." Id. at 204-205.

The court found that defendant's nudity did not rise to the level of communication necessary to invoke the First Amendment privileges and even if these privileges were

invoked, the state had the power to regulate such expression by prohibiting the public display of nudity.

In light of this pronouncement by the Court of Appeals and the presumption of constitutionality of any statute, it is clear that Judge Walz exceeded his authority as a jurist.

P.L. 245.01 is a law of strict liability making intent irrelevant. No state of mind evidence need be presented by the prosecutor, guilt may be established by mere performance of a voluntary act. At trial, the prosecutor brought forth seven witnesses who testified in sum and substance that the female defendants were observed with "their tops off" in Cobbs Hill Park on the afternoon of June 21, 1986. All were ordered to put their tops on or risk arrest, and those that refused were arrested under P.L. Section 245.01. (R-190, 296).

All the defendants testified and they admitted that they knew exposed their breasts during the park demonstration and that they knew that conduct would lead to their arrest. (R. 299-311; 356-439, 592-606, 653-682). Arrested they were but the decision of the lower court saved them from the legal consequences of their actions. In so doing the lower court fashioned a rule which was not foreseen by the legislature in its enactment of Penal Law Section 245.01 - a female must not expose her breats in public unless

she publicly proclaims that she is doing so as a form of protest.

Since Marbury v. Madison, 1 Cranch 137, the judiciary has taken the task of constitutional view of legislative acts. Yet, the doctrine that due process authorizes courts to hold laws unconstitutional when they believe the legislature has acted unwisely (Lochner v. New York, 198 U.S. 45 (1905) and Coppage v. State of Kansas, 236 U.S. 1 (1915)) has been discarded. As stated in 1963, the judiciary has returned to the original constitutional proposition that courts do not substitute their social ....beliefs for the judgment of legislative bodies. (Ferguson v. Skrupa, 372 U.S. 726 (1963) quoted in dissent Griswold v. State, 381 U.S. 52nd 479 (1965).) Indeed, the court must "not sit as a super-legislature to determine the wisdom, need, and propriety of laws that touch...social conditions." Griswold v. State of Connecticut, supra, 381 U.S. at 482. Only the impairment of fundamental personal rights fundamental rights being the traditions and collective conscience of our people (Snyder v. Comm. of Massachusetts, 291 U.S. 97 (1934) or Roe v. Wade, 410 U.S. 113 (1972)) will warrant judicial activism. And yet, the Constitution does require legislatures and in turn the courts to reflect shifting social standards. (Goesaert v. Cleary, 335 U.S.

fundamental personal rights is what this is about! Or have rights & do not

which people?

traditions change
laws can become antiquated
laws should serve peoples needs
not out-dated societal mores
(& rights to be top-free come about as a natural outcome of this)

464, (1948).) If the public clamor is one of permissiveness and a desire for change in the law to permit certain behavior not now allowable, then the state by legislation can change the restrictions and adopt a more liberal law (Paris Adult Theatre I v. Slaton, 413 U.S. 49, 64 (1973).) "(A)ppeal lies to the ballot and to the legislative processes of democratic government, not to the courts." (Maresca v. Cuomo, 64 N.Y. 2d 242, 249 [1983].)

In practice, legislative judicial processes interact to effect change

In the case at hand, it is clear that the seven defendants did expose their breast in public thereby violating the statute. The court refused to find guilt on the ground that the statute, as applied to the defendants' conduct, was unconstitutional. Yet, there existed no showing of the statute's invalidity beyond a reasonable doubt and no showing why the Court of Appeals' explicit explanation in Hollman does not hold sway. Judge Walz indeed sat as a superlegislator/legislature to determine the standard of public sensibilities. "(I)t cannot seriously be argued that public displays of nudity are essential to an ordered system of liberty." (People v. Hollman, supra at 210), and, thus, the defendants' violation of the law was not protected by the First Amendment. The People urge that the informations should therefore be reinstated.

then OT must put on their shirts!

Respectfully submitted,

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